

JOHN W. WHITE  
MARY NELL WHITE

IBLA 94-896

Decided January 12, 1998

Appeal from a decision of the Assistant Director, Office of Surface Mining Reclamation and Enforcement, upholding the reversal of a Lexington Field Office ruling that the Kentucky Department for Surface Mining Reclamation and Enforcement failed to take appropriate action in response to Appellants' citizen's complaint. 94-38-Rail.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: Permits: Generally—Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Upon receipt of a TDN issued in response to a citizen's complaint, the state regulatory authority must either take appropriate action to cause the violation to be abated or show good cause for not taking any action. A response asserting a lack of jurisdiction over a rail spur between a coal mine and a coal preparation plant on the ground that the rail spur is operated by a common carrier holding a certificate of public convenience and necessity issued by the Interstate Commerce Commission is arbitrary and capricious when the state agency provides no other basis for its decision, notwithstanding the fact that it has never required a permit for such a facility in the past.

APPEARANCES: Kenneth W. Humphries, Esq., Hopkinsville, Kentucky, for Appellants; Bruce E. Cryder, Esq., Lexington, Kentucky, for Costain Coal, Inc.; and John Austin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

John W. White and Mary Nell White have appealed the July 22, 1994, Decision of the Assistant Director of Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM). That Decision upheld a February 25, 1994, interim Decision of the Acting Deputy Director reversing a ruling by the Lexington Field Office (LFO), OSM, that the Kentucky

Department for Surface Mining Reclamation and Enforcement (DSMRE) had responded inappropriately to Ten-Day Notice (TDN) No. 93-82-235-04.

The TDN was issued as a result of a citizen's complaint alleging that Costain Coal, Inc. (Costain), had failed to obtain a permit for a railroad spur linking its Caney Creek mine portal with its coal processing plant. In particular, the complaint asserted that the rail spur was being built by a wholly owned subsidiary of Costain, Tradewater Railway Company (Tradewater), to transport coal from Costain's Caney Creek Mine Portal (Permit No. 717-5002) to its coal preparation plant (Permit No. 913-5003).

The Division of Permits, DSMRE, responded to the TDN by a letter dated November 15, 1993, in which it asserted that the railroad spur did not need to be permitted. Acknowledging that such railroad facilities "would be considered affected area [requiring a permit] if they were being constructed solely by and for the use of the permittee," DSMRE concluded that no permit was required in this case because the railroad was to be constructed, operated, and maintained by Tradewater Railway Company, a common carrier regulated by the Interstate Commerce Commission (ICC).

The LFO determined that DSMRE's response was inappropriate. Its finding was that DSMRE should not exempt the railroad merely because it was owned and operated by a third party subject to regulation by the ICC as a common carrier. Instead, LFO concluded that DSMRE should "analyze the site-specific situation and make a determination whether the railroad" resulted from or was incident to mining activities, or was otherwise covered by the definition of a "surface coal mining operation." Therefore, the LFO informed DSMRE by a January 7, 1994, letter that a Federal inspection would be conducted.

By letter dated January 12, 1994, DSMRE requested an informal review of the LFO Decision by the Deputy Director, OSM, asserting that DSMRE has never required a common carrier to secure a permit for constructing a railroad. In a Decision dated February 25, 1994, the Acting Deputy Director reversed the LFO Decision. His Decision was based on a finding that OSM had failed to promulgate regulations regarding railroad facilities related to surface coal mining operations, that this was a complex legal issue, and, thus, it would be unfair for OSM to hold that DSMRE was arbitrary and capricious in deciding that the approved State program did not require permitting of railroad spurs.

This latter determination was announced to Appellants by letter of April 26, 1994, from the LFO announcing that the response to the TDN had now been deemed appropriate and that OSM would not be taking further action. Appellants requested informal review of that implementing Decision and on July 22, 1994, the Acting Assistant Director, OSM, upheld the Decision on the same grounds as the February 1994 Decision, noting DSMRE had a 12-year history of not regulating ICC facilities. This appeal was brought from the Acting Assistant Director's Decision.

In their Statement of Reasons (SOR) for appeal, Appellants assert that the DSMRE Decision not to require the spur to be permitted was arbitrary,

capricious, and an abuse of discretion. They claim that DSMRE "violated both the letter and the spirit of the laws" regulating Costain's surface and underground coal mining operations "as such laws apply to the spur and the transport of Costain's coal from one part of its mining operation to another part of its coal mining and processing operation." (SOR at 2.) They contend that OSM failed to enforce and apply the Federal and Kentucky law regulating surface mining operations as required by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1994), and Kentucky Revised Statutes (KRS) Chapter 350.

Appellants claim that the primary function of the railroad spur is to transport coal from Costain's Caney Creek portal to its preparation plant, just as any haul road or conveyor would be used. They point out that the spur goes from one Costain facility to another Costain facility. The Whites also argue that Tradewater is not an independent entity but, rather, a wholly owned subsidiary of Costain. Further, they assert that, while Tradewater constructed the spur, engineering and surveying services were provided by Costain, as was the financing. In addition they aver that Costain personnel negotiated for the acquisition of their property for the spur. Finally they maintain that the only material Tradewater hauls on the spur is Costain coal or Costain supplies. Therefore, they contend that Tradewater is a captive organization, owned and operated by Costain for the purpose of transporting Costain's coal, existing only for that reason. Appellants assert that when the mine is closed Tradewater will cease to exist.

The Whites note that KRS 350.060(1)(a) provides: "No person shall engage in surface coal mining and reclamation operations without having first obtained from [DSMRE] a permit designating the area of land affected by the operation." Surface coal mining operations are defined in KRS 350.010(1) to include

the areas upon which the activities occur or where the activities disturb the natural land surface. The areas shall also include any adjacent land, the use of which is incidental to the activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage \* \* \*, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to the activities.

See 30 U.S.C. § 1291(28)(B) (1994). Appellants assert that the spur is included within that definition because the area covered by the spur is an area upon which "activities occur or where the activities disturb the natural land surface." They contend that the spur is adjacent to the mine and is an area "upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to" the activity of mining coal. Thus, the Whites argue that pursuant

to KRS 350.010(1), the rail spur is a surface coal mining operation, and, pursuant to KRS 350.060, a permit should have been required.

In further support of their argument, the Whites also cite Title 405 of the Kentucky Administrative Regulations (KAR) which implement the requirements of KRS Chapter 350. They note that 405 KAR 8:010 Section 2(1) provides that there must be a valid permit for "the area to be affected" by operations before a person may engage in surface coal mining. They also point out that the definition of affected area in 405 KAR 8:001 Section 1(5) closely parallels the statutory definition of "surface coal mining operations." The regulation defines "affected area" to mean: "Any land or water area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations." Affected area includes the disturbed area and "adjacent lands the use of which is incidental to surface coal mining and reclamation operations," plus "any areas upon which are sited structures, facilities, or other property or material on the surface resulting from, or incident to, surface coal mining and reclamation operations \* \* \*."

Costain has submitted an answer to the SOR in which it asserts that the Assistant Director's conclusion, that DSMRE's response to the TDN was appropriate, had a rational basis. Costain contends that DSMRE had good cause to decline to take enforcement action because it determined that construction of a railroad by a common carrier does not constitute "surface coal mining operations" for purposes of the State program. Hence, it argues no violation exists under the State program.

Noting the DSMRE history of not requiring ICC regulated facilities to be permitted, Costain argues that it would be difficult to find that DSMRE was arbitrary, capricious, or abused its discretion when it determined not to regulate this spur. Therefore, Costain argues OSM was correct in concluding that DSMRE was not arbitrary or capricious in refusing to require a permit.

[1] Under the regulations relating to the TDN procedure, upon receipt of a TDN by the state regulatory authority, the state must take appropriate action or show good cause for not taking action to cause the violation, if any, to be corrected and respond to OSM within 10 days. 30 C.F.R. § 842.11(b)(1)(ii)(B)(1). "Appropriate action" is defined as "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Regulation 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) "lists five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 Fed. Reg. 26735 (July 14, 1988). Relevant to the context of this case, good cause is shown where: "(i) Under the State program, the possible violation does not exist" or "(iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation."

The DSMRE Decision not to take enforcement action in response to the TDN was grounded on a finding that the railroad spur was built and operated

by Tradewater, a common carrier regulated by the ICC. Acknowledging that such railroad facilities would be considered an affected area requiring a permit if they were constructed solely by and for the use of the permittee, DSMRE concluded that it lacked jurisdiction over the spur built by a common carrier.

This Board has in other cases rejected the assertion that the existence of regulatory authority over certain aspects of a transportation facility by an administrative agency preempts the jurisdiction of agencies of the Department of the Interior to adjudicate issues before them within the proper sphere of their statutory and regulatory authority. See, e.g., Ashley Creek Phosphate Co., 134 IBLA 206, 102 Interior Dec. \_\_\_\_ (1995) (pipeline right-of-way issued by Bureau of Land Management (BLM) subject to ICC regulation as common carrier); Wyoming Independent Producers Association, 133 IBLA 65 (1995) (pipeline issued a certificate of convenience and necessity by the Federal Energy Regulatory Commission (FERC)). Thus, in Ashley Creek we held that "BLM has authority to condition the operation of a pipeline as a common carrier in ways that are not specifically within the jurisdiction delegated to another agency." 134 IBLA at 238. Similarly, in Wyoming Independent Producers the issuance of a certificate of convenience and necessity by FERC for an interstate natural gas pipeline was found not to preclude jurisdiction to review the adequacy of the record to support the BLM decision issuing a right-of-way over a specified route. Accordingly, we conclude that the fact that Tradewater had received a certificate of public convenience and necessity from the ICC for the railroad spur does not itself establish good cause for finding either that a violation did not exist or that DSMRE lacked jurisdiction to consider whether the spur embraces adjacent "areas upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to the [surface mining] activities." KRS 350.010(1); see 30 U.S.C. § 1291(28)(B) (1994).

As noted by OSM, under the relevant regulations both "appropriate action" and "good cause" for failure to cause a violation to be corrected are to be measured by whether the state regulatory authority's action or response to a TDN is arbitrary, capricious, or an abuse of discretion under the state program. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2); Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 74, 102 Interior Dec. 1, 9 (1995). In response to the TDN, the DSMRE found that the rail spur would be considered an affected area subject to permit requirements if constructed solely by and for the use of the permittee. <sup>1/</sup> In view of the fact that Tradewater

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<sup>1/</sup> The issue of the authority to regulate rail spurs in connection with surface mining activities has been the subject of litigation. At one time, the Department defined the term "support facilities" resulting from or incident to a mining operation to indicate they "may" include "railroads" and other transportation facilities. 30 C.F.R. §§ 701.5, 816.181; 48 Fed. Reg. 20401 (May 5, 1983). In reviewing a challenge to these regulations, the court held that the broad language of section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1994), permits the Secretary to regulate railroads, provided that they are "resulting from or incident to" mining activities. National Wildlife Federation v. Hodel, 839 F.2d 694, 745-46,

was a common carrier, however, DSMRE declined to apply the permit requirements. The Assistant Director's Decision upholding the DSMRE response to the TDN was based on his conclusion that, in view of the fact DSMRE had a 12-year history of not requiring ICC facilities to be permitted, it would be "difficult to find that the [DSMRE] was arbitrary, capricious, or abused its discretion when it determined not to regulate this railroad spur." (Decision at 1.) Despite a past history of not regulating facilities operated by common carriers, we find as set forth above that issuance of a certificate of public convenience and necessity by the ICC establishes no basis, by itself, for the decision not to investigate further and, hence, the response of DSMRE is arbitrary and capricious. <sup>2/</sup> We find this case to be distinguishable from our recent decision in Citizen's Coal Council, 142 IBLA 33 (1997), where the transportation of processed coal (the end product) by long distance rail or slurry pipeline to the user was found not to render the facilities subject to SMCRA regulation since this would encompass all transportation facilities. Accordingly, we find that in this case, DSMRE failed to show good cause.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge

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fn. 1 (continued)

n.80 (D.C. Cir. 1988). In 1988, the Department deleted that regulatory definition while leaving the requirement of 30 C.F.R. § 816.181 that "support facilities" be operated under a permit for the mine or coal preparation plant to which they were incident or from which their operation resulted. Thus, the Department rejected any categorical inclusion or exclusion in favor of a case-by-case determination of what facilities are properly regulated under SMCRA. See 53 Fed. Reg. 47378, 47380, 47382 (Nov. 22, 1988).

<sup>2/</sup> The record before us contains assertions by Appellants, OSM, and Costain with respect to the extent to which the rail spur was used for transport of commodities other than coal and used to transport coal which was not processed at the Costain plant prior to placing it into commerce. The issue before us at this point is limited to the question of whether the response of DSMRE showed good cause for failure to take further action. We find that these matters are properly examined on remand.

